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IN THE
Supreme Court of the United States

TEXAS DEMOCRATIC PARTY and BOYD L. RICHIE, in his capacity as Chairman of the Texas Democratic Party,

Petitioners,

v.

ROGER WILLIAMS, in his capacity as Secretary of State for the State of Texas,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

States employ various voting systems and some record voter intent more accurately than do others. One line of authority — *Reynolds v. Sims*, 377 U.S. 533 (1964), *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), and *Bush v. Gore*, 531 U.S. 98 (2000) — subjects state laws diluting the fundamental right to vote to the highest degree of scrutiny, but another line of authority — *Anderson v. Celebrezze*, 460 U.S. 780 (1982), *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Crawford v. Marion County Election Bd.*, ___ U.S. ___, 128 S. Ct. 1610 (2008) — applies more flexible and lenient scrutiny to state laws regulating ballot access by candidates and voters. The courts of appeals are divided on which of these two lines of cases apply when a voting system demonstrably fails to record votes and whether a voting system with a significantly higher failure to record votes can pass even the more lenient level of scrutiny.

This case presents the following important questions:

1. Does a state's certification and use of a voting method that undercounts votes at a significantly greater rate than other technology used in the same state and election violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment?

2. Should courts apply strict scrutiny to voting systems with a measured and statistically significant failure to count votes?

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The Texas Democratic Party and its Chairman Boyd Richie respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-2a) is unreported but may be located at 2008 WL 2916349. The opinion of the United States District Court (App., *infra*, 3a-20a) is also unreported.

JURISDICTION

The Court of Appeals' judgment and opinion was entered on July 30, 2008. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1) because this is an application for Writ of Certiorari from a judgment in a civil case.

The Fifth Circuit Court of Appeals' jurisdiction was conferred by 28 U.S.C. § 1291 because the appeal concerns the final judgment of a district court.

The district court's jurisdiction was conferred by 28 U.S.C. § 1331 because the case concerns issues arising under the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONST. amend. XIV, § 2 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Since the events surrounding *Bush v. Gore* illuminated the problem of poorly designed voting methods and the lost "undervotes" they produce, challenges to this sort of disparate treatment of voters have multiplied.[1] Two courts of appeals have now held that the use of voting systems that produce significantly higher levels of undervotes than other systems used in the same state violates the Fourteenth Amendment's guarantee of equal protection. *See Stewart v. Blackwell*, 444 F.3d 843, 862-63 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692, 918 (6th Cir. 2007); *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 894-95 (9th Cir. 2003), *rev'd on other grounds*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc).

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1. "Undervotes" occur when a voting system fails to record a voter selection in a given race, thereby showing the voter intended no selection.

In contrast to the Sixth and Ninth Circuits, the Fifth Circuit in this case found no constitutional violation in such a disparity. (*See* App. at 2a.) In support of its decision, by adopting the district court opinion, the Fifth Circuit cited *Wexler v. Anderson* 452 F.3d 1226 (11th Cir. 2006) and *Weber v. Shelly*, 347 F.3d 1101 (9th Cir. 2003). *Wexler* and *Weber*, unlike *Stewart* and *Shelly*, apply rational basis review to states' voting technology decisions, and they do not directly address a higher incidence of undervotes. *See id.*

The fundamental analytical distinctions in these decisions reflect the widespread disagreement in this area among the Circuits. The en banc Ninth Circuit noted in *Shelley* that this area of the law was uncertain. *See Shelley*, 344 F.3d at 918.

The conflict of the circuits in this area will allow some states, either deliberately or by neglect, to undermine the Fourteenth Amendment in the fundamental exercise of democracy. The questions raised by these cases could hardly be more important to innumerable elections around the country, and voters and election officials alike would benefit greatly from the Court's answer.

A. Decisions below.

Petitioners filed this suit against the chief election officer for the State of Texas, the Texas Secretary of State, claiming that the Direct Record Electronic ("DRE") Voting System known as the eSlate, manufactured by Hart InterCivic, has a measurable and significant failure to record votes when compared to other voting systems permitted for use in Texas. The eSlate is used by more than 100 Texas counties

including some of the most populated counties where the cities of Houston, Austin, and Corpus Christi are situated. The same software version of eSlate is used in the states of Kentucky and Pennsylvania.

Texas employs a variety of voting systems and the choice of the particular system is made by county election administrators. The county election administrators are required to select from a list of approved devices that are formulated and certified by the Texas Secretary of State. *See* TEX. ELEC. CODE ANN. § 122.031, *et seq.* (Vernon 2003).

Petitioners claim violations of the U.S. Constitution because the eSlate fails to record votes at a significantly higher rate than do paper ballots used throughout the state. Petitioners further claim that the user interface of eSlate violates the Due Process Clause of the Fourteenth Amendment because it is inherently misleading.

Petitioners request injunctive relief prohibiting the further use of the eSlate in Texas until such time as it is re-programmed so that it properly records votes.

The Texas Secretary of State filed a Motion for Summary Judgment arguing (1) Petitioners' constitutional claims should be considered under the sliding scale *Anderson/Burdick* test and not strict scrutiny as other circuits had required and the Petitioners requested; (2) that the state's interest in administering elections permitted it to approve diverse voting systems despite the alleged failure to accurately record votes; and (3) any infringement on a voter's

fundamental rights were overcome by these important state interests.

Petitioners offered voluminous evidence that the eSlate fails, in a measurable and significant way, to record votes. This evidence included affidavits, cast ballots, election returns, depositions and three expert reports.

The district court denied all the relief requested by Petitioners and followed the *Anderson/Burdick* line of cases, as the Secretary urged, and it granted the summary judgment. In its opinion, the district court did not cite the two opinions from the courts of appeals that found constitutional violations under these facts. (*See* App. at 17a-18a) Instead, the district court relied on two courts of appeals opinions that affirmed state regulations authorizing voting systems without a verifiable paper trail. *See id.* Petitioners timely appealed to the Fifth Circuit.

The Fifth Circuit affirmed the decision of the district court. (*See* App. at 1a-2a) The Fifth Circuit cited to this Court's opinion in *Crawford v. Marion County Election Bd.*, ___ U.S. ___, 128 S. Ct. 1610 (2008), which was decided after the district court's ruling but before oral argument at the Court of Appeals. The Fifth Circuit also adopted the "well reasoned" opinion of the district court. (*See* App. at 2a.) Therefore, the district court and the Fifth Circuit held that the *Anderson/Burdick* test be applied to a vote tabulation case. By implication, the Fifth Circuit held that a voting system that fails to record votes in a measurable and significant manner passes both a rational basis and strict scrutiny review because the state has an important regulatory interest in offering diverse voting systems.

B. The measured and unreasonable failure to record votes.

Petitioners presented almost 400 pages of evidence to the district court that the eSlate predictably fails to record votes significantly more often than do paper ballots also used in the state. These documents included affidavits from voters describing how they voted on the eSlate. It also included 2006 election returns, sample ballots, actual cast ballots, depositions and reports from three experts.

The 2006 election returns offered from Nueces County, the county seat of Corpus Christi, showed an average undervote on the eSlate of *4.64%* in the race for United States Senate, the first race on the ballot that year. In sharp contrast, paper ballots used in Nueces County during the same election recorded only a *1.79%* undervote in that same race. In other words, voters who used eSlate, by almost 4.64%, had no vote recorded from them for the United States Senate, whereas voters who cast paper ballots, by only 1.79%, were recorded as having no selection for United States Senate. In particular precincts, the undervote recorded by the eSlate amounted to as much as 17%, but the paper ballot undervote remained constant.

Petitioners also offered an expert statistical analysis by Daniel Francis concerning the eSlate's failure to record votes. The expert found the higher incidence in undervotes by the eSlate in the Nueces County returns was not merely due to chance but was instead caused by the machine itself. He concluded, "A clear pattern emerged in Nueces County where the method of voting

[eSlate vs. paper ballot] correlated with, and, in fact, predicted the percentage of undervotes in the race for U.S. Senate in 2006."

The expert also performed an analysis of other counties' undervote percentages by comparing the counties' undervote percentages before and after the eSlate was adopted. The study used data from eight counties, including the home counties of Houston, Austin and Fort Worth. It considered data in the races for Lieutenant Governor, Attorney General, and Comptroller. Based upon the review of this data, the expert concluded that the eSlate's usage correlated with a higher percentage of undervotes and those undervotes had less than one-tenth of one percent probability of being caused by chance.

The expert concluded the eSlate's predictably produces an average increase in undervotes of 1.85% over and above the undervote recorded on paper ballot.

This Court found in *Bush v. Gore* that nationwide statistical data showed an average undervote of 2%. *See Bush*, 531 U.S. at 103. Paper ballots used in Texas fall below this threshold. The eSlate, according to the evidence presented to the district court, averages an undervote of 4.64% in Texas, well over the threshold.

The Secretary did not contest the undervote data or the expert statistical analysis. However, neither the district court or the court of appeals cite or discuss this evidence in their opinions.

C. The eSlate's operation.

Petitioners also offered evidence concerning why the eSlate fails to record votes. In contrast, the State conceded it had no explanation for the increase in undervotes.

The explanation for the eSlate's failure to record votes that was supported by the evidence offered by Petitioners requires an understanding of the eSlate's operation. A voter who casts a general election ballot on the eSlate begins his or her voting by entering a pin number provided by the election precinct staff. The voter is then presented with the first of several ballot screens. The first choice given to the voter is to make a straight-party selection. Below the straight-party choice is each individual race with an option for each candidate for that race.

If a straight-party selection is made, each of the selected party's nominees would have the box next to their name automatically filled in by the eSlate system where they are listed in the individual races below. Thus, a voter could choose to move forward to cast their ballot but the eSlate does not prevent the voter from making choices in the individual races that have already been decided by the straight-party choice. A voter could continue down the ballot selecting again each nominee from their selected party or they could choose another candidate.

At any time, a voter may choose to move forward and cast his vote at which time he is presented with a "review screen." The review screen is the final image a voter sees before casting his vote. This screen is what a voter must use to confirm the eSlate will properly record his vote selections as there is no paper record or other confirmation. It is also this screen that is printed after the election if a manual recount is requested.

Two citizens with completely different intents can vote on the eSlate, and yet both will be presented with a review screen that looks like this:

Contest	**Selected**
Straight-Party	Republican
U.S. Senator	No Selection
U.S. Representative	No Selection
Governor	No Selection
Lt. Governor	No Selection
Attorney General	No Selection
* * *	* * *

The voter is then left to determine what votes will be recorded if the "cast vote" button is pressed and the voter leaves the booth. Petitioners claim many voters review this screen and conclude a vote will be recorded for every Republican nominee on the ballot. Respondent claims the voter should clearly know they are casting a blank ballot. In fact, the eSlate records the review

screen above as a blank ballot—no votes are recorded whatsoever.

What the voter does not know and has not been informed is that the eSlate only records the selections listed under the specific races; it does not record the general straight-ticket vote.[2] Because the eSlate does not warn a voter he is casting a blank ballot in this situation, the voter never knows all his vote choices have been lost.

The fundamental flaw with the eSlate's review screen is highlighted when it is considered from the perspective of different voters with different intents. One voter could be a highly motivated Republican straight-ticket voter who makes his straight-ticket selection and then continues down the ballot to individually select each Republican nominee. The first time a voter chose a nominee from the same party as his straight-ticket choice, he would receive this warning, "Be aware that you are changing a straight-party choice." There is no way, however, for the voter to know that "change" means no vote whatsoever.

If the voter continues down the screen selecting nominees from the same party as his straight-ticket

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2. Actually, the eSlate considers the straight-ticket selection one time by automatically filing in each square for the nominees from the selected party. A voter can then override those individual choices. The central problem with the eSlate is that the review screen continues to show the straight-ticket choice even though individual race selections are the only ones counted. The problem is worsened because the voter is not informed that only their individual choices will count.

choice, he will receive no more warnings and the review screen he is presented with will appear as above. These voters are referred to as "emphasis voters" and Petitioners offered evidence that there are numerous persons in the state that vote this way for one of the political parties. Thus, a voter who desires to cast a ballot for each nominee of a given party is instead recorded as having voted for no one – a clearly inaccurate record.

Petitioners alleged that if this defect were allowed to continue, it would be exploited to unwittingly deny voters their franchise. In fact, there is evidence this is already occurring.[3] If this manipulation is allowed to continue, the eSlate's significantly unreasonable undervote is likely to increase in future elections, thereby exacerbating the already significant harm.

Now consider a voter with a completely different intent but who would be presented with the same review screen. This voter also makes a Republican straight-party selection but he continues down the ballot to each individual race intentionally de-selecting each nominee

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3. As of this writing, there are a little more than a dozen days before the 2008 Presidential Election. Emails and rumors have spread in Dallas and Houston claiming voters can only secure a vote for Senator Barack Obama by selecting the Democratic Party straight-ticket choice and also selecting his name individually. *See* Kelly Shannon, *Democrats Cry Foul Over Suspicious E-mail*, DALLAS MORNING NEWS, Oct. 5, 2008, available at *http://www.dallasnews.com/sharedcontent/APStories/stories/D93R2C780.html* (accessed Oct. 16, 2008). As has been shown, voting in this manner will result in that person being recorded as having made no selection for President of the United States.

with the goal of casting a blank ballot. The Secretary alleged below, without evidence, that voters routinely vote in this manner and referred to them as "protest voters." This voter too will be presented with the same review screen depicted above and will be left to determine if his vote is being recorded blank as desired. No evidence was offered by the state to explain why so many more "protest voters" use the eSlate than paper ballots. The state further has not explained why a protest voter would bother to make any marks at all to secure a blank ballot.[4]

Finally, consider the voter who makes a straight-ticket Republican choice and continues down the ballot where he intentionally selects or de-selects the Republican nominees for Senate and House of Representatives but leaves the remaining selections in place. This voter would see this review screen:

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4. Interestingly, a voter who used the eSlate that made no selections whatsoever would be presented with a review screen that showed no selection for the straight-party choice as well as no selection for each office. If the voter attempted to cast this ballot, the machine would warn him a blank ballot was being cast. If the voter desired to cast a blank ballot, he could do so. Conversely, when a voter unwittingly casts a blank ballot by selecting the straight-party choice and then selecting/de-selecting all nominees from that party, no such warning is given to the voter informing him a blank ballot will be cast.

Contest	Selected
Straight-Party	Republican
United States Senator	No Selection
United States Representative	No Selection
Governor	John Adams
Lt. Governor	Ben Franklin
Attorney General	Sam Adams
* * *	* * *

Again, the voter is left to wonder whether a vote will be recorded for all Republican nominees or only those specifically listed.

The above examples illuminate why the eSlate fails to record many more votes than do other systems: There is more than one reasonable interpretation of the review screen as to what votes will actually be cast. In other words, voters who use the eSlate suffer a greater burden than do voters using other systems in determining how the eSlate will count their vote. As a result, voters who cast ballots on the eSlate are more likely to cast an undervote than are voters who use other systems in Texas.

The eSlate also treats candidates differently in that a manual recount will always be different than the automated count. Recall that the eSlate only records individual vote selections and it ignores the straight-party vote shown on the review screen. When a manual recount is requested, it is performed by reviewing printed review screens. State law requires straight-

ticket votes be counted in each race with a nominee from that party unless a voter affirmatively marks a nominee from another party individually. *See* TEX. ELEC. CODE ANN. § 65.007 (Vernon 2003). In a manual recount, the eSlate's printed review screen's notation of a straight-party vote will always be recorded for all nominees from that party even though each individual race shows no selection. For example, if a person were to bubble-in a straight-ticket vote on a paper ballot and made no other marks, this would be counted as a vote for all nominees of that party. The paper ballot, like the eSlate review screen, would show "no selection" for each individual race. The manual count of the eSlate screens is performed exactly as if the review screen were a paper ballot. Thus, the straight-party selection is counted in the manual count but not the automated count.

Because the manual recount is the much more accurate count on the eSlate, candidates in eSlate counties must pay the expense of a manual recount in order to obtain an accurate result. *See* TEX. ELEC. CODE ANN. §§ 212.111–.113 (Vernon 2003). Meanwhile, voters and candidates in non-eSlate counties can obtain an accurate count without paying the expense of a manual count.

Petitioners produced evidence creating genuine issues of material fact as to whether and to what extent this confusing interface causes a measurable and significant failure to record votes compared to other voting systems in the state and whether and to what extent candidates throughout the state are treated differently in obtaining accurate counts of election results.

REASONS FOR GRANTING THE PETITION

I. There are express conflicts among the Circuits on whether a state may permit the use of a voting system that demonstrably fails to record votes.

Commentators have written extensively on the confusion in the law regarding challenges to the constitutionality of voting systems and vote tabulation techniques.[5] Two circuits have now held that the use of voting systems that produce significantly higher numbers of undervotes than other systems used in the same state violates the Fourteenth Amendment's guarantee of equal protection; these courts found such a constitutional violation no matter the level of scrutiny given to the voting system. *See Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003), *rev'd on other grounds*, 344 F.3d 914 (9th Cir. 2003) (en banc); *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007) (per curiam). These decisions relied upon this Court's holdings in *Reynolds*, *Harper*, and *Bush v. Gore* and each opinion references, either explicitly or by dissent, the lack of clarity in the law on these issues.

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5. *See, e.g.*, Chad Flanders, *Bush v. Gore and the Uses of "Limiting"*, 116 YALE L.J. 1159 (2007); Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Machines: Explanations and Opportunities*, 156 U. PA. L. REV. 313 (2007); Richard L. Hansen, *The Untimely Death of Bush v. Gore*, 68 OHIO ST. L.J. 925 (2007); Edward B. Foley, *The Future of Bush v. Gore*, 68 OHIO ST. L.J. 925 (2007); Christopher Banks, *The Constitutional Politics of Interpreting the Fourteenth Amendment*, 36 AKRON L. REV. 425 (2003); Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and Bush v. Gore*, 35 AKRON L. REV. 185 (2002).

By contrast, in this case, the Fifth Circuit and the district court relied on two circuit cases, *Wexler v. Anderson*, 452 F.3d 1226 (11th Cir. 2006), and *Weber v. Shelly*, 347 F.3d 1101 (9th Cir. 2003), addressing the constitutionality of state regulations permitting voting systems for use with no paper trail. In the opinions of those courts, a state's interest in employing diverse voting systems overcomes any burden placed on the voter by a higher degree of failure to record votes. (*See* App. at 16a-17a.) Each of these cases relied on this Court's holdings in *Anderson* and *Burdick*.[6]

These two lines of cases exhibit a confusion among the courts as to the appropriate scrutiny to apply to state decisions concerning voting technology when that technology can be demonstrated to produce a greater number of undervotes than other systems approved for use in that same state. Also, these two lines of authority exhibit a confusion as to whether a voting system with a measurable and significant increase in undervotes over other systems in use in the state can satisfy either level of scrutiny applied. *See Stewart*, 444 F.3d at 872 (finding a voting system with a high degree of undervotes failed a strict scrutiny analysis but would not pass an *Anderson/Burdick* level of scrutiny, even if the law so required).

This Court should resolve the substantial uncertainty that these decisions reveal regarding the

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6. As a result of the Fifth Circuit's decision in this case, the eSlate is lawfully used in Texas whereas a constitutional challenge to the same eSlate system in use in Kentucky would likely be sustained in light of the Sixth Circuit's decision in *Stewart*.

recurrent controversies over states' use of voting methods that undercount many more votes than other systems used by those same states in the same elections. These issues have national importance since they define the scope of the fundamental right to vote. Numerous election administrators, political parties and candidates throughout the nation require guidance on these important issues. Identifiable defects in voting systems can and will be used by political players to advance their cause. Unwitting voters and the Democracy will suffer the harm.

What is more, this case presents fundamental issues of federalism in so far as election administration decisions have historically been left to the state. When does a state's decision to employ inaccurate voting systems rise to a violation of the federal constitution? How are the important federally guaranteed rights of citizens balanced against a state's interest to employ diverse voting systems? When, as is the case here, does the state have the obligation to reprogram election equipment, at limited cost, to ensure a higher degree of accuracy? If a relatively simple and inexpensive solution is available, why should it not be utilized under the facts of this case? What level of concern is given to issues of cost insofar as they relate to adopting accurate voting systems?

Lower courts have attempted to balance these concerns while giving respect to this Court's past decisions. These courts disagree as to which of this Court's decisions control the determination of these cases. This Court should consider this case to resolve these important issues of law.

A. The Fifth Circuit's decision conflicts with holdings of the Sixth and Ninth Circuits that voters have a fundamental right to cast votes on voting systems that do not record an unreasonably high undervote.

The most recent prior court of appeals to consider the claims asserted in this case is the Sixth Circuit. *See Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007) (per curiam). In *Stewart*, the plaintiffs complained that punch card ballots used in 69 of 88 Ohio counties reported predictable and unreasonable residual votes.[7] *See id.* at 847–48. Focusing on undervotes, the plaintiffs claimed that intentional under-voting in presidential elections existed at .23-.75%. *See id.* In contrast, punch card systems in Ohio recorded an undervote of 2.4% (the eSlate's average undervote is 4.64%). *See id.* at 849–50.

The court, citing *Bush v. Gore* and *Reynolds v. Sims*, found that consideration of these claims required strict scrutiny. *See id.* at 859. Importantly, the Sixth Circuit noted that even if the voting systems were analyzed under a rational basis review, a constitutional violation existed. *See id.* at 872. The court found that a voting system with high rate of error must either be reprogrammed or not permitted in use. *See id.* According to the court, a voting system with such a degree of undervotes violates the Fourteenth Amendment.

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7. Residual votes include undervotes (where no selection is recorded) and overvotes (where more than one selection is recorded).

The *Stewart* opinion was accompanied by a vigorous dissent. The dissent noted that any consideration of the holding in *Bush v. Gore* was improper since the holding in that case was limited to the facts of the 2000 Presidential Election. *See id.* at 887. Instead, the dissent asserted that constitutional claims such as these should be considered under the sliding scale analysis adopted in *Anderson v. Celebrezze*, 460 U.S. 780 (1982) and *Burdick v. Takushi*, 504 U.S. 428 (1992). The dissent found the state had asserted sufficient interest under a rational basis review to uphold the use of the challenged voting systems. *See id.* at 894.

The Ninth Circuit also has considered the constitutional claims raised by a voting system that records a predictable and unreasonable undervote in the context of the election to recall California's Governor Gray Davis. *See Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003), *rev'd on other grounds*, 344 F.3d 914 (9th Cir. 2003) (en banc).

The plaintiffs in *Shelley* requested an injunction delaying the upcoming election until election authorities replaced punch card voting systems with newer, more accurate systems. Plaintiffs claimed the punch card voting system had an average combined residual vote rate of 2.23%. *See Shelley*, 344 F.3d at 917. The residual vote rate of the punch card system was significantly higher than that of other voting systems in use for the same election. *See id.* A unanimous panel of the Ninth Circuit granted the injunction request and reviewed the voting system with strict scrutiny. *See Shelley*, 344 F.3d at 894 (citing *Bush v. Gore*, 531 U.S. 98 (2000) and *Reynolds v. Simms*, 377 U.S. 533 (1964)). The *Shelley*

Court noted that, "no voting system is fool proof . . . and the constitution does not demand the use of the best available technology." *Id.* at 895. However, the court noted that when a voting system can be demonstrated to have a significantly higher error rate than the other systems in the state, the system runs afoul of the Equal Protection Clause. *See id.* at 895–96.

Days later, the Ninth Circuit, sitting en banc, reversed and withdrew the decision of its panel on the basis that the election was days away and courts should rarely enjoin an election. *See Shelley*, 344 F.3d at 917. The Ninth Circuit held "we are met with legal authority on both sides of the contest. There is no doubt that the right to vote is fundamental, but a federal court cannot lightly intervene with or enjoin a state election." *Id.* (citing *Reynolds*, 377 U.S. at 555). The court further stated:

> We have not previously had occasion to consider the precise equal protection claim raised here. That a panel of this court unanimously concluded the claim had merit provides evidence that the argument is one over which reasonable jurists may differ.

Id. at 918. Given the lack of clarity in the law and substantial Supreme Court authority requiring the greatest constraint in delaying or moving an election date, the Ninth Circuit found it not to be an abuse of discretion for the district court to decline to grant an injunction stopping the election. The en banc court refused to address the central equal protection claims and therefore left the withdrawn panel decision unconsidered. *See Id.*

B. The Fifth Circuit's decision conflicts with decisions from the First and Fourth Circuits considering similar issues.

Though the volume of voting system litigation has dramatically increased since the 2000 Presidential Election, many of the issues these cases present have already been considered by federal courts during the last century. In *Hendon v. North Carolina State Board of Elections*, 710 F.2d 177 (4th Cir. 1983), the Fourth Circuit held that (1) strict scrutiny applies to cases involving the tabulation of votes and (2) state officials cannot constitutionally alter the tabulation of votes when voter intent is clear. *See id.* at 180–81.

The *Hendon* case involved a close election for the United States House of Representatives. Voters within the congressional district used one of four voting systems. *See id.* at 179. After the final vote tally, Hendon, the Republican nominee, was certified as the loser by approximately 1,400 votes. *See id.* Hendon presented evidence that a number of votes cast for him, significant enough to change the outcome of the election, were not recorded. *See id.* In these votes, voters had made a straight party selection for the Democratic Party, but also voted for Hendon individually. *See id.* State law required ballots so marked to record only the straight party selection and to ignore the specific and inconsistent selection for the Republican nominee for the House of Representatives. *See id.* at 180.

The Fourth Circuit held that Hendon's claims of alleged vote infringement "must be carefully and meticulously scrutinized." *Id.* at 180 (citing *Reynolds v.*

Simms, 377 U.S. 533, 562 (1964)). The Court held "the imposition of a legislative preference for the straight party candidate when the voter has indicated no such preference, is an arbitrary subversion of the electoral process that serves no compelling state interest." *Id.* The Fourth Circuit noted that no other courts had held contrary to its holding. In fact, the Chief Judge for the Third Circuit, sitting by designation as a district court, had reached the same conclusion. *See id.* (citing *Melchoir v. Todman*, 296 F. Supp. 900, 901–02 (D.V.I. 1968).

Hendon raised another constitutional claim with regard to the voting systems in his race. In two of the four voting systems at issue in *Hendon*, it was significantly more difficult to cast split ticket votes than it was in the other two systems in use. *See id.* at 181. The Fourth Circuit held that the state may employ diverse voting systems but "a state may not, however, place an onerous burden on voters' exercise of their right to vote, and there must be a rational explanation when it is manifest that a greater burden may be placed upon the voter depending upon the method of voting employed in his voting place." *Id.* (citing *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973) and *McDonald v. Board of Election Comm'ners of Chicago*, 394 U.S. 802, 807–09 (1969)). Thus, the Fourth Circuit seemed to adopt a review standard between strict scrutiny and rational basis. *See id.*

The Fourth Circuit remanded the case to the district court to consider the extent to which the challenged voting systems could be reprogrammed "to record split tickets in substantially the same manner as [the other]

voting machines." *Id.* at 182. On remand, the district court found that the machines could be reprogrammed and it was so ordered. *See Hendon v. North Carolina State Bd. of Elections*, 633 F. Supp. 454, 471 (W.D.N.C. 1986).

Prior to *Hendon*, the First Circuit dealt with the interplay between state decisions of election administration and the Fourteenth Amendment. *See Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978). A Rhode Island statute had permitted absentee and shut-in voting in all elections but it did not specify whether it was permitted in primary elections. *See id.* at 1067. A primary election was held and local elections administrators allowed absentee and shut-in ballots to be cast — they amounted to ten percent of the total vote. *See id.* The state supreme court subsequently ruled that because the statute did not specifically allow these types of votes in a primary election, they were not to be counted. *See id.* at 1068. The outcome of the election was changed by ignoring the absentee and shut-in ballots.

Evidence was offered to the district court that some, if not most, of the voters who cast absentee and shut-in ballots would have made arrangements to vote in person had they known their ballots would not be counted. *See id.* at 1069. The First Circuit affirmed the holding of the district court that failing to record these votes was invidious to the Fourteenth Amendment. *See id.* at 1074–76. The court of appeals supported its holding with an extensive discussion of this Court's ruling in *Reynolds*. *See id.* Despite the expense and difficulty, the court affirmed the decision of the district court requiring a new election be held. *See id.* at 1079.

Two district courts have followed the same analysis as the *Shelley* and *Stewart* courts, though they came earlier in time. The District Court of the Central District of California was one of the first courts after *Bush v. Gore* to face an undervote challenge. *See Common Cause Southern Christian v. Jones*, 213 F. Supp. 2d 1106 (C.D. Cal. 2001). Plaintiffs had sued alleging punch card ballot systems in use in the state were less reliable than other systems also approved for use. *See id.* at 1107. Plaintiffs claimed voters who used this system were significantly less likely to have their votes recorded. *See id.* In denying a motion to dismiss the case, the district court summarized the five decisions of this Court it found controlling. *See id.* at 1108–10. The *Common Cause* Court discussed *Reynolds*, *Harper*, *Anderson*, *Burdick*, and *Bush v. Gore*. *See id.* The court recognized these cases presented different analytical frameworks to consider challenges to voting equipment but left resolution of that conflict for another day. *See id.*

The District Court of the Northern District of Illinois was soon thereafter presented with a case challenging a voting system's unreasonably high undervote. *See Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002). That court's decision began the analysis with a discussion of the controversy concerning voting systems that developed as a result of the 2000 Presidential Election as well as this Court's holding in *Bush v. Gore*. *See id.* at 891. The *Black* Court noted that the federal judiciary could not guarantee 100% accuracy of voting systems but that the courts should "guarantee the equal treatment of voters who attempt to have their votes counted, their voices heard." *Id.*

The Court discussed what it termed as a "limited holding" in *Bush v. Gore* yet it concluded, "However, we believe that situation presented by this case is sufficiently related to the situation presented in *Bush* that the holding should be the same." *Id.* at 899. The Court acknowledged the holding in *Burdick* but found *Bush v. Gore* and *Reynolds* to be the controlling authorities. *See id.* at 898-900. The Court went on to conclude that the plaintiffs could proceed on their case to prove a higher degree of undervotes by one voting system as opposed to another and if so proven, a constitutional violation.

C. The Fifth Circuit takes a different approach.

The Fifth Circuit adopted the reasoning of the district court "in its well-considered opinion." (*See* App. at 2a.) A considerable part of the district court's analysis relied upon two circuit decisions that did not address undervotes but did concern state regulation of voting technology. *See Wexler v. Anderson* 452 F.3d 1226 (11th Cir. 2006); *Weber v. Shelly*, 347 F.3d 1101 (9th Cir. 2003). Each of these opinions draws from the *Anderson/Burdick* line of cases. The Fifth Circuit's citation of *Crawford* reveals the lower courts' view that voting technology cases, even when addressing undervotes, must be decided under the flexible *Anderson/Burdick* standard.

In *Wexler*, the issue before the court of appeals was "whether Florida's manual recount procedures in those counties employing paperless touchscreen voting machines violate the rights of voters to equal protection and due process under the Fifth and Fourteenth Amendments to the United States Constitution." *Wexler*, 452 F.3d at 1227. The crux of the plaintiff's argument was that the certification of the paperless system violated due process

and equal protection because the machine did not produce a paper trail sufficient for a re-count. *See id.* The court rejected the claim, cited the *Anderson/Burdick* line of cases, and found the state to have a sufficient interest to overcome whatever burdens are created by the lack of paper trail.

In *Weber*, the plaintiff broadly challenged the California Secretary of State's certification of an electronic voting system that did not have a paper trail. *Weber*, 347 F.3d at 1104. The plaintiff in *Weber* sought to have the entire system declared unconstitutional because its lack of a paper trail increased the possibility of fraud. *See id.* at 1104–05. The *Weber* court rejected the plaintiff's contention that strict scrutiny applied, noting "Under *Burdick*, the use of touchscreen voting systems is not subject to strict scrutiny simply because this particular balloting system may make the possibility of some kinds of fraud more difficult to detect." *See id.* at 1106.

The dissent in *Stewart also* urged the adoption of the more flexible *Anderson/Burdick* standard. *See Stewart*, 444 F.3d at 884. The dissent cited *Weber* to support its conclusion in this regard. *See id.* at 894. In employing such a standard, the dissent determined a higher degree of undervotes did not rise to a constitutional injury. *See id* at 891–92. Issues of federalism persuaded the dissenting judge to leave intact state election equipment decisions even when they injure the fundamental right to vote. *See id.* at 893–94.

Neither *Weber* or *Wexler* involved a challenge to a voting system because the system produced a significant and measurable undervote. Nevertheless, the Fifth Circuit, the district court, and the dissent in *Stewart* found these

cases persuasive in disposing of federal cases challenging state decisions on the adoption of voting technologies that produce a measurable and significant number of undervotes.

D. This Court should resolve the confusion among the lower courts on these important and recurring Constitutional issues.

This Court has long recognized that the right to vote is fundamental. *See Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). The accurate recording of election preferences is the sum and substance of the Democracy. Equally important as the correct recording of voter intent is the public's perception that election results are reasonably accurate.

As elections continue to be decided by razor-thin margins, disputes concerning the accuracy of voting equipment will equally continue. The holdings of cases in line with *Reynolds v. Sims* and *Bush v. Gore* are in conflict with the line of cases following *Anderson v. Celebrese* and *Burdick v. Takushi*. This court should resolve this dispute not only because the voting systems challenged in this case are used in three states but also because lower courts require direction as to the standard of review (*i.e.* strict scrutiny or *Anderson/Burdick*) to apply to these challenges.

The important question as to when state election decisions concerning certification of voting equipment can run afoul of the federal charter underlies this circuit division. There is real concern that the wrong analysis could turn state election decisions into federal cases. On the other hand, there is the equally real concern that the

wrong analysis will undermine the Democracy by excluding significant numbers of voters.

The Court should consider this case and resolve the complex interplay between traditional state decisions regarding election administration and federal law demanding equal weight for all voters.

II. This Court should grant certiorari because the Fifth Circuit's ruling is contrary to this Court's holdings in *Reynolds*, *Harper* and *Bush v. Gore* as well as other lower court rulings.

Both of the *Stewart* and *Shelley* courts relied heavily on this Court's ruling in *Bush v. Gore* but also on authorities that predate that controversy. For the panels on the Ninth and Sixth Circuits, *Bush v. Gore* synthesized a line of cases including *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) and *Reynolds v. Sims*, 377 U.S. 533 (1964). On the other hand, the dissent in *Stewart v. Blackwell*, and the Courts who considered this case, gave little precedential value to the Court's holding in *Bush v. Gore*. Regardless of the controlling nature of the holding in *Bush v. Gore*, this Court has long held the right to vote may not be diluted without running afoul of the Fourteenth Amendment.

Whatever the standard of review, the analysis begins with the burden the eSlate places on the fundamental right to vote. The eSlate produces a higher percentage of undervotes (4.64%) than either of the systems held unconstitutional in *Shelley* and *Stewart*. This Court recognized in *Bush v. Gore* that an undervote greater than 2% was constitutionally suspect. *See Bush*, 531 U.S. at 103. Twice that number of voters who use the eSlate are being

recorded as having made no selection in the highest office on the ballot. The burden could be no more severe. Voters' choices are completely lost.

The next step in the consideration is the state's interest in retaining the challenged voting system. The state claimed its interest was to retain a variety of voting technologies.

Requiring that the eSlate be reprogrammed to ensure accuracy does nothing to minimize the variety of voting systems. Altering the software does not change the fundamental platform of the system. The state and the manufacturer's witnesses attested that the eSlate goes through at least one software change each election cycle. There was no claim that re-programming the system, as requested by Petitioners, would be burdensome or costly.

Petitioners urge state actions that permit voting systems with a significant number of undervotes be subjected to strict scrutiny. However, petitioners do not claim the law should require the best available technology be used in each election. Inflexibility to that degree would require states to continuously replace voting systems when technological advances cause even the slightest increase in accuracy. On the other hand, voting systems that exhibit a failure to record votes at the degree of the eSlate, and that can be re-programmed without the replacement of hardware and therefore without great expense, should be so altered. When the burden is as severe as lost votes and the repair is merely re-programming, federal courts should require states make the repair. Whether rational basis or strict scrutiny review, the eSlate is invidious to the Fourteenth Amendment.

CONCLUSION

Courts throughout the nation are increasingly confronting federal challenges to state decisions regarding voting systems and vote tabulation. These courts are having trouble reconciling two lines of authority from this Court. In particular, they cannot agree as to the level of scrutiny to apply such state decisions under the U.S. Constitution. These courts also disagree as to whether a voting system with a significant failure to record votes can pass any level of scrutiny. Important issues of federalism underlie these determinations. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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